STATE OF MICHIGAN

COURT OF APPEALS

SHARI KAUFMAN and ALON KAUFMAN, Plaintiffs/Counterdefendants-Appellants,	UNPUBLISHED May 29, 2014
v	No. 307279 Oakland Circuit Court
ERIC CHARLES DESIGNS, LTD., Defendant/Counterplaintiff-Appellee,	LC No. 2009-106091-CZ
and ERIC JIRGENS, Defendant-Appellee.	

Before: JANSEN, P.J., and O'CONNELL and M. J. KELLY, JJ.

PER CURIAM.

In this action involving plaintiffs' termination of an oral agreement for interior design services, plaintiffs appeal by right the judgment, entered after a jury trial, awarding them $61,000, plus interest of $3,194.21, against defendant Eric Charles Designs, Ltd. ("ECD"), and awarding ECD $683,050, plus interest of $28,947.94, on its counterclaim against plaintiffs. Plaintiffs' claims against individual defendant Eric Jirgens, ECD's primary designer and principal, were dismissed before trial pursuant to MCR 2.116(C)(8). We affirm.

Plaintiffs first argue that ECD's breach of contract claim was barred by the statute of frauds, MCL 566.132(1)(a), because it could not be performed within one year. Whether the statute of frauds bars enforcement of a purported contract presents a question of law that this Court reviews de novo. *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995). Plaintiffs' discussion focuses on the trial court's denial of their motion for a directed verdict at trial. In reviewing the denial of a motion for a directed verdict, this Court examines the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). "Only if the evidence so viewed fails to establish the claim as a matter of law, should the motion be granted." *Id.*

MCL 566.132(1)(a) states:

> In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:
>
> (a) An agreement that, by its terms, is not to be performed within 1 year from the making of the agreement.

The purpose of the statute of frauds is not only to "prevent fraudulent construction of a written contract, but also to prevent disputes over what provisions were included in an oral contract." *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 82; 443 NW2d 451 (1989); *Kelsey v McDonald*, 76 Mich 188, 193; 42 NW 1103 (1889). "It is well-settled that where an oral contract may be completed in less than one year, even though it is probable that the contract will extend for a period of years, the statute of frauds is not violated." *Farrell v Auto Club of Mich*, 155 Mich App 378, 385; 399 NW2d 531 (1986), remanded on other grounds 433 Mich 913 (1989). "[A]n agreement for an indefinite term of employment is generally regarded as not being within the proscription of the statute of frauds." *Phinney v Perlmutter*, 222 Mich App 513, 523; 564 NW2d 532 (1997). Where an agreement includes the right to terminate within a year, the exercise of that option is still performance according to the terms of the contract. *Fothergill v McKay Press*, 361 Mich 666, 674-675; 106 NW2d 215 (1960). And where "the contract may, according to its terms, be performed within a year[,] no statute of frauds question arises." *Id*. at 675. In the present case, the parties agreed that their oral contract was terminable by either party. The oral contract is not one that "by its terms" was incapable of being performed within a year. MCL 566.132(1)(a). Therefore, the statute of frauds does not bar ECD's counterclaim for breach of contract.

Plaintiffs next argue that the at-will nature of the contract precluded ECD's recovery of expectation damages as a matter of law. This Court reviews de novo questions of law. *Everton v Williams*, 270 Mich App 348, 349-350; 715 NW2d 320 (2006).

In a breach of contract action, a party generally may recover damages that "arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 414-415; 295 NW2d 50 (1980). "Application of this principle in the commercial contract situation generally results in a limitation of damages to the monetary value of the contract had the breaching party fully performed under it." *Id*. "The party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

In support of their argument, plaintiffs rely on authority concerning damages that may be recovered for breach of an at-will employment contract. For instance, *Sepanske v Bendix Corp*, 147 Mich App 819; 384 NW2d 54 (1985), and its progeny support the view that only nominal damages are recoverable for actions stemming from termination of an employment contract that is terminable at will. In *Sepanske*, 147 Mich App at 829, this Court held that the plaintiff was

entitled to only nominal damages for the defendant's breach of the at-will employment contract because

> [t]he jury's damage assessment in such a situation amounts to pure speculation. There is no tangible basis upon which damages may be assessed where plaintiff's expectation was for an at-will position which could have been changed or from which he could have been terminated without consequence.

In *Environair, Inc v Steelcase, Inc*, 190 Mich App 289, 294; 475 NW2d 366 (1991), overruled by *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83; 706 NW2d 843 (2005), this Court held that the *Sepanske* Court's "holding regarding the speculative nature of damages is just as applicable to a nonemployment situation also involving an at-will contractual relationship." The relationship at issue in *Environair* was an exclusive sales contract, and the claims at issue were for tortious interference with a business relationship and tortious interference with a contract.

The limitation on damages stemming from termination of an at-will contract as a matter of law, as reflected in *Sepanske* and *Environair*, was rejected in *Health Call of Detroit*, 268 Mich App 83. In that case, a special conflict panel of this Court considered whether the plaintiff was limited to nominal damages for breach of contract and tortious interference claims that stemmed from the termination of a nursing services contract that was terminable at will. The plaintiff had contracts with the defendant nurses by which they provided nursing services for the plaintiff's clients. The defendant Atrium Health Care allegedly lured one of the nurses to terminate her contract with the plaintiff and to encourage other nurses to do the same. The nurses continued to provide nursing services for one of the plaintiff's clients, who terminated her contract with the plaintiff. The plaintiff brought claims against the defendants that blended tortious interference claims, as well as a breach of contract claim, against the nurses. In ruling on the defendants' motion for summary disposition, the trial court limited the damages that were available for the tort and contract claims. *Id*. at 89. The trial court reasoned that that losses or damages associated with the nursing services contract with the client were not available because the contract was terminable at will and the damages would be speculative. *Id*.

This Court explained that *Environair* "stand[s] for the proposition that damages arising out of or related to the termination of an at-will contract are speculative as a matter of law in all cases because there is no tangible basis on which damages can be assessed." *Health Call of Detroit*, 268 Mich App at 98. However, this Court overruled *Environair*, concluding:

> [A] blanket rule limiting recovery to nominal damages as a matter of law in all actions arising out of or related to the termination of at-will contracts is not legally sound, because there may exist factual scenarios in which there is a tangible basis on which future damages may be assessed that are not overly speculative despite the at-will nature of the underlying contract. [*Health Call of Detroit*, 268 Mich App at 85-86.]

The implications of *Health Call of Detroit* are thoroughly discussed in *Everton*, 270 Mich App 348, in which this Court rejected the defendant's argument that *Health Call of Detroit* did not apply where the underlying contract is an at-will employment contract, explaining:

> The holding is not limited in application to cases in which the underlying at-will contract is not an employment contract-it applies to all cases involving the termination of an at-will contract, employment or otherwise. And we agree with that holding. There is no obvious reason to distinguish between types of at-will contracts, particularly with respect to the issue of damages arising out of or related to their termination, because the same difficulty in establishing damages is inherent in all these types of cases. We agree . . . that, albeit rare situations, "there may exist factual scenarios in which there is a tangible basis on which future damages may be assessed that are not overly speculative despite the at-will nature of the underlying contract." [*Everton*, 270 Mich App at 353, quoting *Health Call of Detroit*, 268 Mich App at 86.]

In short, the fact that the agreement between ECD and plaintiffs in this case was terminable at will did not preclude ECD from recovering future expectation damages as a matter of law.

Plaintiffs also contend that ECD's damages for lost commissions were speculative. In *Health Call of Detroit*, 268 Mich App at 96-97, this Court summarized the law regarding damages that are claimed to be "speculative," stating:

> The general rule is that remote, contingent, and speculative damages cannot be recovered in Michigan in a tort action. A plaintiff asserting a cause of action has the burden of proving damages with reasonable certainty, and damages predicated on speculation and conjecture are not recoverable. Damages, however, are not speculative simply because they cannot be ascertained with mathematical precision. Although the result may only be an approximation, it is sufficient if a reasonable basis for computation exists. Moreover, the law will not demand that a plaintiff show a higher degree of certainty than the nature of the case permits. Thus, when the nature of a case permits only an estimation of damages or a part of the damages with certainty, it is proper to place before the jury all the facts and circumstances which have a tendency to show their probable amount. Furthermore, the certainty requirement is relaxed where damages have been established but the amount of damages remains an open question. Questions regarding what damages may be reasonably anticipated are issues better left to the trier of fact. [Citations and internal quotations omitted.]

In the present case, there was no dispute that, at the time of the agreement between ECD and plaintiffs, the parties contemplated that ECD would furnish the home and would be paid a 30-percent commission on the furnishings and any artwork purchased through ECD. The dispute concerned the parties' expectations concerning the amount that plaintiffs would spend. Plaintiffs claimed that the budget for furnishings was $2 million, not including artwork. Jirgens did not recall there being a $2 million budget. According to Jirgens, when he and Alon Kaufman agreed on a 30-percent commission, there was no particular amount of furniture or artwork that was discussed. Based on Jirgens's experience in the industry and his own home, he anticipated a budget of $150 a square foot for furnishings, not including artwork. Jirgens acknowledged that he did not formally propose to plaintiffs a budget of $5 million for art and $5 million for furniture.

In light of this evidence, the trial court correctly submitted the issue to the jury. The evidence supported the existence of damages, but the amount of those damages involved a factual dispute. "Questions regarding what damages may be reasonably anticipated are issues better left to the trier of fact." *Health Call of Detroit*, 268 Mich App at 96-97.

Plaintiffs argue that ECD should not have been permitted to recover damages for its claim based on the preparation of drawings under a theory of quantum meruit or unjust enrichment because the parties had an express oral contract for interior design services, and the preparation of drawings was included in the design fee. Because plaintiffs rely on trial testimony in support of their argument and argue that the trial court erred by allowing ECD's claims for both breach of contract and unjust enrichment to proceed to the jury, we will analyze this issue as a challenge to the trial court's denial of plaintiffs' motion for a directed verdict. In reviewing the denial of a motion for a directed verdict, this Court examines the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Wilkinson*, 463 Mich at 391. "Only if the evidence so viewed fails to establish the claim as a matter of law, should the motion be granted." *Id.*

A claim for unjust enrichment requires the plaintiff to show that (1) the defendant received a benefit from the plaintiff, and (2) a resulting inequity to the plaintiff because of the retention of the benefit by the defendant. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 137; 676 NW2d 633 (2003). If those requirements are established, then "a contract will be implied by law to prevent unjust enrichment." *Id.* "But a contract cannot be implied when an express contract already addresses the pertinent subject matter." *Id.*

Viewed in the light most favorable to ECD, the evidence showed that ECD performed additional work (i.e., the completion of detailed technical drawings) that was not contemplated by the parties at the time of their original agreement. According to Jirgens, the parties did not contemplate that ECD would supply the detailed technical drawings; when ECD was hired, the architect was doing the drawings and ECD did not even have the staff to do that type of work. Jirgens explained that the drawings were "something that was kind of a project creep that was expanding the scope of what I was being asked to do." A letter dated December 12, 2005, from the architect to Alon Kaufman proposed:

> If you would like us to get involved in drawing interior trim details, we could bring someone on board at DTA and you could pay for their salary directly. If you would like, I will talk to Eric to see if he has anyone he could suggest.

This evidence supports the view that the drawings were considered a separate, additional project that ECD took on after the initial agreement. In 2007, Alon Kaufman asked Jirgens to "get him caught up so he would know where he is" with respect to payment for the drawings. Thus, Alon recognized that the drawings were additional work that was not part of the parties' express oral agreement. Because the evidence, viewed in the light most favorable to ECD, shows that the work was outside the scope of the parties' express oral agreement, the existence of the express agreement did not preclude ECD's claim for unjust enrichment.

Plaintiffs next argue that a new trial is warranted because of defense counsel's misconduct in repeatedly commenting about plaintiffs' wealth in an effort to prejudice the jury.

Plaintiffs raised this issue in a motion for a new trial, which the trial court denied. This Court reviews for an abuse of discretion a trial court's denial of a motion for a new trial. *Kelly v Builder's Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes. *Heaton v Benton Constr Co*, 286 Mich App 528, 538; 780 NW2d 618 (2009).

Misconduct by trial counsel during trial may be grounds for a new trial. See *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 289-293; 602 NW2d 854 (1999) (misconduct by the plaintiff's counsel included unfounded accusations of "conspiracy, collusion, and perjury" by the defendants and their witnesses that would have warranted a new trial had the Court not already determined that the defendants were entitled to entry of a judgment notwithstanding the verdict). In evaluating misconduct in that scenario, the *Badalamenti* Court explained that it was guided by the following analysis in *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982):

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action.

Plaintiffs compare defense counsel's statements in this case to those in *Reetz*, a personal injury action. In that case, plaintiffs' counsel referred to the purported unavailability of worker's compensation benefits, made seven references to multi-million dollar verdicts that juries had awarded in other cases, made accusations of perjury, and repeatedly referred to the wealth of the defendant corporation and New York Yankees's owner George Steinbrenner III, who was the chairman of the board of the defendant's parent company. With respect to the latter, this Court stated that the effect was to create "an image of . . . an unfeeling, powerful corporation controlled by a ruthless millionaire." *Id*. at 111.

> Our prior cases should have made clear that even isolated comments like these are always improper, even if not always incurable or error requiring reversal. However, when, as in this case, the theme is constantly repeated so that the error becomes indelibly impressed on the juror's consciousness, the error becomes incurable and requires reversal. [*Id*.]

However, reference to a party's affluence is not improper where it relates to a material issue in the case. In *Watkins v Manchester*, 220 Mich App 337, 339; 559 NW2d 81 (1996), this Court evaluated defense counsel's "reference to plaintiff's affluent lifestyle, including her mink coat, Lincoln Continental, and expensive house in Dexter, as well as counsel's repeated

references to plaintiff's access to money through a structured settlement in an unrelated medical malpractice action involving her handicapped child." *Id*. This Court held that the references were proper "[b]ecause plaintiff's ability to pay defendant's legal fees was a material issue in this matter." *Id*.

In the present case, plaintiffs' affluence was material to evaluating Jirgens's testimony that ECD expected commissions on $5 million for furnishings, as opposed to plaintiffs' contention that the budget was only $2 million. Therefore, many of the references to plaintiffs' wealth were arguably proper. To the extent that some of the challenged remarks could be considered improper, they were harmless. The subject matter of plaintiffs' lawsuit made their wealth readily apparent. Considering counsel's remarks in light of the nature of the case and the issues involved, the trial court did not abuse its discretion by denying plaintiffs' motion for a new trial on this ground.

Finally, plaintiffs challenge the trial court's order granting summary disposition to defendant Jirgens pursuant to MCR 2.116(C)(8). They argue that their complaint stated a viable claim of breach of contract against him individually. Defendants argue that ECD's satisfaction of the judgment in favor of plaintiffs renders this issue moot. We agree with defendants.

The satisfaction of judgment was filed on September 22, 2011, and states that the judgment in favor of plaintiffs against ECD was satisfied in full. "The general rule states that a satisfaction of judgment is the end of proceedings and bars any further effort to alter or amend the final judgment." *Becker v Halliday*, 218 Mich App 576; 554 NW2d 67 (1996). "A satisfaction of judgment extinguishes the claim and . . . may be reviewed on a very limited basis." *Id*. at 579. In *Becker*, 218 Mich App at 578, this Court reiterated the holding in *Wolhfert v Kresge*, 120 Mich App 178; 327 NW2d 427 (1982), that "a party who accepts a satisfaction in whole or in part waives the right to maintain an appeal or seek review of the judgment for error, as long as the appeal or review might result in putting at issue the right to the relief already received. On the other hand, there is no waiver of appeal where the appeal addresses an issue collateral to the benefits already accepted."

Contrary to defendants' argument, the satisfaction of judgment does not implicate this Court's jurisdiction. This Court has jurisdiction over the appeal from the final judgment under MCR 7.203(A). A party's waiver of the right to appeal may preclude relief, but it does not implicate this Court's jurisdiction. Even when this Court has determined that a satisfaction of judgment precludes relief, it has not done so on the basis that this Court lacked jurisdiction to consider the appeal and the arguments advanced. See, e.g., *Becker*, 218 Mich App 576; *Kaminski v Newton*, 176 Mich App 326, 333; 438 NW2d 915 (1989).

Nonetheless, the satisfaction of judgment regarding ECD precludes plaintiffs' challenge to the order granting summary disposition to Jirgens, whom plaintiffs alleged was "jointly and severally" liable with ECD on the same claim. Because of the satisfaction of judgment, plaintiffs waived the right to challenge the judgment in their favor and against ECD. That judgment established the amount of loss that plaintiffs were entitled for ECD's breach of contract. "[W]hen a judgment is based on actual litigation of the measure of a loss, and the judgment is thereafter paid in full, the injured party has no enforceable claim against any other obligor who is responsible for the same loss." *Kaminiski,* 176 Mich App at 331, quoting Restatement of

Judgments, 2d, § 50, p 40, comment d (emphasis omitted). For example, in *Kaminiski*, 176 Mich App 326, the plaintiffs brought a malpractice action against the hospital and the doctor, jointly and severally. The jury returned a verdict in favor of the plaintiffs and against the doctor, but a judgment of no cause of action was rendered against the hospital. The doctor satisfied the judgment, and the plaintiffs filed a satisfaction of judgment. Then the plaintiffs moved for a new trial against the hospital, which the trial court denied. They appealed the judgment of no cause of action. This Court explained that the plaintiffs' loss was fixed by actual litigation, and the plaintiffs' full compensation was established by the satisfaction of judgment. "Satisfaction of the judgment based on actual litigation of the measure of plaintiffs' loss discharges any potential liability of [the hospital] to plaintiffs for that loss and this renders plaintiffs' appeal moot." *Id*. at 333.

In the present case, plaintiffs' loss from ECD's breach of contract was established by the jury, and the satisfaction of judgment precludes plaintiffs from challenging the amount of that loss. Plaintiffs alleged that Jirgens was "jointly and severally" liable with ECD for the breach of contract. Plaintiffs have already been fully compensated for that loss. Therefore, to the extent that plaintiffs are challenging the trial court's order granting summary disposition to Jirgens, their appeal of that issue is moot. *Kaminiski*, 176 Mich App at 333.

Affirmed. No costs pursuant to MCR 7.219, no party having prevailed in full.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Michael J. Kelly